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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAWS
AMENDING AND SUPPLEMENTING**

**(1) THE LAW ON CONSTITUTIONAL PROCEEDINGS
AND
(2) THE LAW ON THE CONSTITUTIONAL COURT
OF KYRGYZSTAN**

On the basis of comments by:

**Mr Harry GSTÖHL (Member, Liechtenstein)
Mr Peter PACZOLAY (Member, Hungary)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. By letter dated 6 May 2008, the Chair of the Constitutional Court of Kyrgyzstan, Ms Svetlana Sydykova, requested an opinion on: (1) the draft Law amending and supplementing the Law on constitutional proceedings in Kyrgyzstan; (2) the draft Law amending and supplementing the Law on the Constitutional Court; (3) the Law on the Status of Judges; (4) the Law on Court Juries; (5) the Law on Bodies of Judicial Self-government and (6) the Law amending and supplementing the Law on the Supreme Court and local courts. Laws (1) and (2) are dealt with in this opinion and laws (3) to (6) will be dealt with in a separate opinion (Opinion 480).

2. The present opinion was drawn up on the basis of comments by Messrs Gstöhl and Paczolay, who were invited by the Venice Commission to act as rapporteurs. Their comments figure in documents CDL(2008)068 and 070 respectively.

3. A conference on the topic "Supremacy of law and the independence of the judiciary – guarantees for the stability of democratic institutions" was organised in Bishkek, Kyrgyzstan on 27-28 May 2008 together with the Constitutional Court. The purpose of the conference was to allow the rapporteurs to discuss and obtain information on the current judicial reform in Kyrgyzstan, in the context of the request for an opinion on the six draft laws/amendments mentioned above.

4. This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice,).

GENERAL REMARKS

5. The amendments to the laws on constitutional proceedings and on the Constitutional Court form a part of the current judicial reform that is taking place in Kyrgyzstan. It is however important to note that they do not constitute a comprehensive revision of these laws and should be regarded as mere partial adjustments.

6. Both laws are closely linked together and often literally repeat the same provisions. The main amendments concern the following areas:

- I. election of judges, including the appointment of the president and deputy president of the Constitutional Court;
- II. regulation of the status of judges in a separate law;
- III. composition and competence of the Constitutional Court;
- IV. exemption of judicial decisions from the Court's power of review;
- V. obligation of presenting an annual report on the state of constitutionality;
- VI. procedure for presenting the budget;
- VII. redefinition of the quorum;
- VIII. use of official language;
- IX. list of authorities authorised to apply to the Constitutional Court.

1. Election of judges, including the appointment of the president and deputy president of the Constitutional Court

7. Article 4 of the Law on the Constitutional Court as to be amended (*hereinafter the "Draft CC"*) deals with the president and deputy president's election to the Constitutional Court. The new procedure provides that the President of Kyrgyzstan appoints the president and deputy president of the Constitutional Court for a term of five years from among the Constitutional Court's judges, with the agreement of the *Jogorku Kenesh* (*hereinafter "Parliament"*). It is not clear what is meant by "agreement" of Parliament, but it may mean a vote on the proposal of the head of state. This procedure should be further detailed and should indicate whether a

qualified majority vote is required. The fact that the Constitutional Court's president is elected by a political actor and not the Court itself is a widely accepted phenomenon. Nevertheless, **the election of the President by the court is, of course, preferable from the perspective of the independence of the court.**

8. Article 5 of the *Draft CC* on the election of judges to the Constitutional Court has been reworded, and the general length of the term of office for judges, which was fifteen years, has been dropped and not replaced. The regulation of the term of office of judges is not clearly set out in the draft Law on the status of judges either, but is written in the Constitution: judges of the Constitutional and Supreme Court shall have tenure and keep their offices until they retire at the age of 70 (Article 83.5 para.3 of the Constitution).

9. This Article also sets out that for the election of a judge, a majority of the total number of the People's Representatives in Parliament is required. A higher **qualified majority**, e.g. two thirds, might be better to **ensure the opposition's participation in the election of judges.**

10. In the light of past problems encountered in other countries, it might be useful to **introduce a provision stating that judges who are going to retire should stay in office until their successor takes office.**

II. Regulation of the status of judges in a separate law

11. The *Draft CC* deletes all of Chapter III on the status of judges of the Constitutional Court. This Chapter regulated, *inter alia*, the independence, the inviolability, the suspension of constitutional judges, the termination of their offices and their labour law status.

12. It seems that these amendments intend to assimilate judges of the Constitutional Court to those of ordinary courts. Such an assimilation does not take into account the special position of a Constitutional Court, which has a specific constitutional task, notably the annulment of laws and normative acts. By its very nature, this task may create conflicts between the Constitutional Court and political powers. While the basic requirements for judicial independence are the same for both ordinary and constitutional court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. **Therefore, constitutional court judges are in need of special guarantees for their independence, as set out in the current Chapter III, which should not be deleted.**

13. The provisions deleted under Chapter III are now regulated by the draft Law on the status of judges: under its Chapter 2, it provides for guarantees of the independence of judges (Art.11 Independence of Judges; Art.12 Inadmissibility of interference in the activity of a judge; Art.13 Irremovability of judges; Art. 14 Immunity of judges) indicating, *inter alia*, that a judge cannot be dismissed from office other than under the procedure and on the grounds established in the Constitution and the draft Law on status of judges. It therefore seems that the Venice Commission's advice in a previous opinion¹, that the dismissal of judges be dealt with only by the Constitution, has to a certain extent been heeded.

III. Composition and competence of the Constitutional Court

14. The rewording of Article 4 of the *Draft CC* on the composition of the Constitutional Court seems to have been made in order to comply with the Constitution. However, in its Opinion on the Constitutional Situation in the Kyrgyz Republic (CDL-AD(2007)045, paragraph 83), the Venice Commission already criticized the strong role of the President of the Republic in the appointment of judges to the Constitutional Court. While this competence is part of the

¹ CDL-AD(2007)045 *Opinion on the Constitutional Situation in the Kyrgyz Republic*, para 54.

Constitution itself, which may be difficult to amend, the law **could provide for (non-binding) but public proposals for candidates to the President by a neutral body**, for example the Council of Judges.

15. Furthermore, the election of the judges is done by simple majority only. The Constitution should ensure the *“inclusion of a broad political spectrum in the nominating procedure”*² by providing for qualified majority for the election of the judges by Parliament. The composition and the procedure for the appointment of judges to the Constitutional Court *“are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force.”*³

16. Article 13 of the *Draft CC* and Article 11 of the Law on Constitutional Proceedings as to be amended (hereinafter *Draft Proceedings*) define the competence of the Constitutional Court, with the result that the Constitutional Court's competence is limited to the following five cases:

- a) constitutional review of acts and other regulatory acts;
- b) official interpretations of the norms of the Constitution;
- c) review of the constitutionality of presidential elections;
- d) removal from office of the President of the Republic;
- e) decisions on constitutional amendments.

17. Item b) introduces a new competence for the Court to provide an **official interpretation of the norms of the Constitution**. Although such a competence also exists in other countries, it has the notable drawback that the Court is obliged to provide such an interpretation on a purely abstract basis. Constitutional courts usually provide decisions on conflicts and have the benefit of hearing both sides before rendering their judgments. The danger of providing such a competence is that in reality a conflict exists, but one party prefers to request an interpretation of the Constitution rather than bring the conflict (often a conflict of competence) openly to Court. In such cases, the Court is forced to render a judgment without having had the benefit of hearing both sides. **The Venice Commission therefore does not recommend the introduction of such a competence.**

18. According to the *Draft CC*, the following competences will be deleted from Article 11 of the *Law on Constitutional Proceedings*:

- removal of judges of the Constitutional and the Supreme Court (11.4);
- consent to the initiation of criminal proceedings against a judge of a local court (11.5);
- declaring the unconstitutionality of decisions of local government bodies (11.7);
- deciding the constitutionality of the legal practice affecting constitutional rights of citizens (11.8).

19. Removing the task of deciding the *“constitutionality of the legal practice affecting the constitutional rights of citizens”* is a very critical point in the amendments. Although the present formulation of this competence appears to be somewhat vague, it nevertheless provides an important guarantee for the protection of human rights.

20. Article 14.8 of the current *Law on Constitutional Proceedings* (Article 14.10 of the *Draft Proceedings*) **allows individual citizens and legal entities to appeal to the Constitutional**

² See for example, CDL-AD(2004)043 Opinion on the proposal to amend the Constitution of the Republic of Moldova.

³ Ibid.

Court on “*questions directly affecting their constitutional rights if these do not lie within the competence of other courts*”. This right should, of course, **not be limited to citizens, but be extended to any individual, including foreigners and stateless people**, who are under the jurisdiction of Kyrgyzstan.

21. This type of individual complaint is limited to cases that do “*not lie within the competence of other courts*”, which is regrettable as it seems to exclude judgments rendered by ordinary courts from constitutional control. Other aspects of this individual complaint therefore become even more important. This concerns, first of all, the constitutional control of normative (including legislative) acts in the form of an abstract control.

22. Article 11.8 of the current *Law on Constitutional Proceedings* provides for the control of the “*constitutionality of the application of laws, which affects the constitutional rights of citizens.*” This clause seems to provide a sound basis for control of individual acts, as this is where laws are being applied on a daily basis. However, if a request for such control comes from an individual, it must be read together with the limitation contained in Article 14.8 of the current *Law on Constitutional Proceedings*, i.e. it cannot deal with cases which “*lie within the competence of other courts*” and it seems to be limited to administrative cases. In addition to individual cases, even a control of a general practice, for instance a generally applied interpretation of provisions of law, seems to fall within the scope of Article 11.8 of the current *Law on Constitutional Proceedings*. **Therefore, Article 11.8 has a very important function, not only for the protection of human rights in the administrative field, but also in the area of general judicial practice and should not be removed.**

23. The same applies to Article 11.7 of the current *Law on Constitutional Proceedings*. The **setting aside of local authority decisions contravening the Constitution** are an important guarantee for the protection of human rights. This competence **should be maintained**.

IV. Exemption of judicial decisions from the Court's power of review

24. Article 14 paragraph 4 of the current *Law on the Constitutional Court* provides that court decisions based on unconstitutional normative acts (laws) “*shall not be subject to execution*”. The *Draft CC* (Article 14 para. 4 in point 6 of *Draft CC*) provides that judicial acts based on unconstitutional norms shall be reviewed by the court in every specific case upon complaints of citizens whose rights and freedoms have been affected. The *Draft CC* therefore refers to a special complaints procedure that takes place in front of ordinary courts instead of the automatic *ex lege* exclusion of the execution of such decisions.

25. The current *Law on the Constitutional Court* provides for an *ex nunc* effect of the Constitutional Court's decisions. A rigid application of such an *ex nunc* effect could potentially have serious implications for society and could result in a heavy burden on the state budget if numerous cases have to be reopened, which date back to the distant past. The current legislation does not provide for an attenuation of this effect by the Constitutional Court, as is the case for example in Portugal where the Court itself can limit the effects of its *ex nunc* judgments.

26. Article 14 paragraph 3 *Draft CC* provides for a change of the strict *ex nunc* rule by stating that judgments by the ordinary courts, which have final force, shall not be reopened. This means a shift from an *ex nunc* effect to an *ex tunc* effect. **The amendment is welcome insofar as it enforces legal security by clarifying the relationship between the Constitutional Court and ordinary courts.** Nonetheless, **it should be ensured that at least the complainant, especially an individual complaint, benefit from winning a case before the Constitutional Court.** If his/her case is already settled by a final decision, it should be reopened even if final judgments in other similar cases remain in force. This is necessary in

order to provide an incentive for an individual to bring a case in the first place – the so-called “premium for the catcher” (of the unconstitutionality).

27. It is important to underline that, as a general rule, the relationship between the Constitutional Court and "ordinary" high courts must be determined in clear terms.

V. *Obligation of presenting an annual report on the state of constitutionality*

28. Under Article 15.3 of the current *Law on the Constitutional Court*, the practice in Kyrgyzstan is for the president of the Constitutional Court to annually forward information on the state of affairs with respect to constitutionality to the President of Kyrgyzstan, Parliament and Government.

29. Article 15.3 of the *Draft CC* (point 7) makes this obligation more precise by setting out that the President of the Constitutional Court must present an annual report on the state of constitutionality, but now it only needs to be addressed to Parliament.

30. This change is also reflected in draft Article 24 paragraph 5 of the *Law on Constitutional Proceedings*, which provides that the Constitutional Court prepare an annual report on the state of constitutionality and presents it to Parliament. Usually, courts speak through their judgments rather than through reports, but the limitation of this obligation to send a report to Parliament only is more in line with the principle of the rule of law, as at least it does not link the Constitutional Court to the executive branch.

VI. *Procedure for presenting the budget*

31. As regards the financing of the Constitutional Court, Article 18 of the present *Law on the Constitutional Court* sets out that the activities of the Constitutional Court are financed by the national budget.

32. The *Draft CC* would amend Article 18 paragraph 2 that presently states that *pro forma* expenses of the Constitutional Court shall be determined at the session of Parliament upon submission by the president of the Constitutional Court. According to the *Draft CC*, the budget would be submitted by the president of the Constitutional Court to the Council of Judges, and the president would then be obliged to inform this Council on the implementation of the budget.

33. The Council of Judges is a new institution established by the constitutional reform, regulated by Article 84 of the Constitution.⁴ It is likely that the Council of Judges submit the budget of all courts to Government and Parliament.

34. Under a new provision in the *Draft CC*, the president of the Constitutional Court is entitled to participate in sittings of Government and Parliament where the budget of the courts of Kyrgyzstan is discussed.

35. The same reasoning as set out above in relation to the suppression of Chapter III of the present *Law on the Constitutional Court* applies to the procedure of presenting the budget of the Court. The amendments seek to assimilate the Constitutional Court to ordinary courts, which are governed by the Council of Judges. As a special constitutional body, **the Constitutional Court should be entitled to present its own budget, which should not be a part of the general budget of the judiciary.**

⁴ This development was welcomed by the Venice Commission: *CDL-AD(2007)045 Opinion on the Constitutional Situation in the Kyrgyz Republic*.

VII. Redefinition of the quorum

36. Article 3 of the current *Law on constitutional proceedings* defines the necessary quorum needed for the Constitutional Court to render a decision. Under this provision, the regulation of the quorum is twofold:

- (1) examination of cases, drawing up of conclusions, adoption of the rules of the court and motions for the suspension of a judge's powers requires no less than seven judges of the Constitutional Court;
- (2) sessions of the Constitutional Court of Kyrgyzstan on other matters are valid if over half of the court's registered judges participate (at least five).

37. Article 3 of the *Draft Proceedings* unifies the quorum for all procedures: a session of the Constitutional Court is valid if no less than two thirds of its members are present (i.e. six judges). **The uniformity of the quorum makes the procedure of the Constitutional Court more consistent.**

VIII. Use of official language

38. Article 6 of the *Draft Proceedings* introduces the terms of “*an official language*” and the “*language of the proceedings*” to replace the term “*state language*” used by the presently valid law. This is to be **welcomed as it enlarges the respect by state authorities of linguistic rights, allowing constitutional proceedings to take place in another language than the state language.**

IX. List of authorities authorised to apply to the Constitutional Court

39. The amendments to Article 14.8 of the *Draft Proceedings* enlarges the list of **authorities allowed to apply to the Constitutional Court, by adding the Ombudsman (*Akiykatchy*) and the Central Electoral Commission**. In a previous opinion, the Venice Commission had identified a number of countries that allow the Ombudsman to challenge a legislative act in front of the Constitutional Court, notably Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia and Spain. The Venice Commission has recognised the usefulness for the mandate of the Ombudsman or Human Rights Defender to include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms.⁵

40. The list also includes the Central Electoral Commission. Since issues that affect fundamental rights may be brought before this body, it is a welcomed step to give the highest electoral body the possibility to ask the Constitutional Court for constitutional review.

41. **The extension of this list is therefore welcome.**

X. Recommendations relating to provisions that have not been amended in the Law on constitutional proceedings

42. Articles 7 and 8 of the current *Law on constitutional proceedings* are uncommon for constitutional courts. The basic idea seems to be that each judge has to hear each piece of

⁵ CDL-AD(2007)020 *Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan*. Similarly: CDL-AD(2003)006 *Opinion on the Draft Law on the Human Rights defender of Armenia* and CDL-AD(2004)041 *Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe*.

evidence in person. The strong insistence on this principle would be appropriate for criminal cases rather than for constitutional ones. Constitutional proceedings do not usually require taking physical evidence and many constitutional courts deal with their cases in the form of written proceedings only. The exceptions to this may be the impeachment cases, which can be dealt with in a similar manner to criminal proceedings. In other cases, **the Constitutional Court should have a wider choice in dealing with cases so as to also allow for written proceedings.** This may be important in order to avoid an overburdening of the court with individual complaints.

43. Article 18 of the current *Law on constitutional proceedings* on **state levies and costs for bringing a case** to the Constitutional Court are quite rigid. As a guarantee for the protection of human rights, access to the Constitutional Court should be simplified. If there are fees for bringing a case, they **should be relatively low and even then the Court should be able to make exceptions for people who do not have the means to bring a claim, which is not manifestly unfounded.**

44. A number of provisions, such as Article 20, on the exact elements of the minutes, are very detailed and should be regulated by the rules of procedure. This is important not only from a practical point of view, but also as a guarantee for the procedural autonomy of the Court, which otherwise would have to seek an amendment to its Law for each minor change in its procedure.

45. The review of judgments of the Constitutional Court (Article 28) is a very delicate subject. The very existence of such a provision can be used to exert pressure on the Court to make such a review when the judgment displeases other state powers. Article 28.1 seems to allow for the review of a judgment when the constitutional norm or the law serving as the basis for the judgment have changed, which seems unnecessary as in such a situation, the previous judgment would simply remain without object.

CONCLUSION

46. The amendments on the competences and procedures of the Constitutional Court are capable of improving the functioning of the Constitutional Court. Nevertheless, the following recommendations should be taken into account:

- Draft CC deletes Chapter III of the current Law on the Constitutional Court on the status of judges in this Court. The Venice Commission recommends that this Chapter not be deleted, as constitutional court judges are in need of special guarantees for their independence, and this is provided for by Chapter III and they cannot be assimilated to ordinary judges.
- Article 4 of the Draft CC, the election procedure of the president and vice-president of the Constitutional Court should be further detailed to clarify what is meant by "agreement" by Parliament – the procedure should also indicate whether or not a qualified majority vote is required.
- Article 5 of the Draft CC, with respect to the election of a judge, a vote of the majority of the total number of the People's Representatives in Parliament is required - here a higher qualified majority would be welcomed as this would ensure the participation of the opposition in such an election.
- It would also be useful to introduce a provision that judges who are going to retire should remain in office until their successor takes office.
- Article 13 of the Draft CC and Article 11 of the Draft Proceedings define the competence of the Constitutional Court. Item b) on "*official interpretations of the norms of the Constitution*" introduces a new competence for the Court to provide an official

interpretation of the norms of the Constitution, which is not recommended by the Venice Commission.

- Article 14.8 (which will be Article 14.10) of the *Draft Proceedings* the right of individual citizens and legal entities to appeal to the Constitutional Court on “*questions directly affecting their constitutional rights if these do not lie within the competence of other courts*” should be extended to include foreigners and stateless people who come within the jurisdiction of Kyrgyzstan.
- Article 7 and 8 of the current *Law on constitutional proceedings* should be amended to give the Constitutional Court a wider choice in dealing with cases in a written procedure in order to avoid it being overburdened with individual complaints.
- The task of deciding the “*constitutionality of the legal practice affecting the constitutional rights of citizens*” in Article 11.8 of the current *Law on constitutional proceedings* should not be removed, as it provides an important guarantee for the protection of human rights.
- Article 18 paragraph 2 of the *Draft CC*, the Constitutional Court should be entitled to present its own budget, which should not be a part of the general budget for the judiciary.
- Article 11.7 of the current *Law on constitutional proceedings*, the setting aside of local authority decisions contravening the Constitution are an important guarantee for the protection of human rights and should therefore be maintained.
- Article 18 of the current *Law on constitutional proceedings* on state levies and costs for bringing a case to the Constitutional Court should be revised to simplify access to the Constitutional Court.
- In general, the current *Law on constitutional proceedings* has a number of very detailed provisions that should be included in separate rules of procedure.

47. The Venice Commission remains at the disposal of the Kyrgyz authorities for any further assistance.